No. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONER

JOHN J. VECCHIONE
Counsel of Record
JOHN E. MCGLOTHLIN II
MICHAEL R. GESKE
CAUSE OF ACTION INSTITUTE
1875 Eye Street N.W.
Washington, D.C. 20006
(202) 499-4232
John.Vecchione@causeofaction.org
Counsel for Amicus Curiae

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QUESTION PRESENTED

Whether the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begins to run when those proceedings terminate in the defendant's favor (as the majority of circuits has held) or whether it begins to run when the defendant becomes aware of the tainted evidence and its improper use (as the Second Circuit held below).

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BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Cause of Action Institute ("CoA Institute") respectfully submits this *amicus curiae* brief in support of petitioner.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae CoA Institute is a 501(c)(3) nonpartisan, nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.[2] CoA Institute uses various investigative, legal, and communications tools to educate the public on how government accountability, transparency, and the rule of law protect liberty and economic opportunity. As part of this mission, it works to expose and prevent government and agency misuse of power by, *inter alia*, representing third-party plaintiffs in actions against the federal government and appearing as *amicus curiae* before this and other federal courts. *See, e.g.*, *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1460 (2014) (citing brief).

CoA Institute has a particular interest in challenging government overreach in the criminal justice

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *See* Cause of Action Inst., *About*, www.causeofaction.org/about (last visited Nov. 12, 2018).

system and ensuring government accountability in maintaining the rule of law. In order to fulfill this mission, CoA Institute has represented criminal defendants in federal court, *e.g.*, *United States v. Black*, No. CR 12-0002 (N.D. Cal.), appeared as *amicus curiae* in *Yates v. United States*, 135 S. Ct. 1074 (2015), and appeared as *amicus curiae* in other criminal matters before this court. *See, e.g.*, *DeCoster v. United States*, No. 16-877 (2017), *Overton v. United States*, No. 15-1504 (2017), and *Marinello v. United States*, No. 16-1144 (2017).

SUMMARY OF ARGUMENT

After the ruling below by the Second Circuit, a clear split now exists regarding the accrual date for claims of fabrication of evidence under Section 1983. Appellate courts previously analogized such claims to those for malicious prosecution and ruled that they accrued after criminal proceedings terminate in the defendant's favor. The Second Circuit instead decided that such claims accrue when a defendant first "knew or should have known" about the harm, in this instance when first made aware "that such [fabricated] evidence was being used."[3] The result of this split is that geography currently determines whether lawsuits alleging serious government misconduct are timely.

The Second Circuit created this split by establishing a rule which overlooks the nature of fabricated evidence claims. Its new rule will muddy ongoing criminal proceedings, squander judicial resources, and impose an improperly narrow view of how such evidence harms those it is used against. The damage

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[3] *McDonough v. Smith*, 898 F.3d 259, 264 (2d Cir. 2018), quoting *McDonough v. Smith*, No. 1:15-CV-01505, 2016 WL 5717263, at *11 (N.D.N.Y. Sept. 30, 2016).

will be compounded if this new rule spreads to additional circuits before the Court grants certiorari.

Criminal defendants simultaneously acting as plaintiffs in civil litigation will be unable to effectively exercise their rights in either system. Relying on an expectation that civil proceedings will be stayed to mitigate the harm of this ruling is inadequate, particularly with the heightened pleading standards introduced by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). These cases will require the accused to make statements about the case with particularity in his complaint. Even without those standards, the creation of a class of civil suits which only exist to be stayed makes little sense, will often contravene the doctrine of ripeness, and will shrink the already small number of attorneys available to take such cases.

This Court briefly touched on these issues in *Wallace v. Kato*, 549 U.S. 384 (2007). However, that case considered a different type of Section 1983 claim, was decided before both *Twombly* and *Iqbal*, and referenced only civil cases entirely unrelated to the extant criminal matter, e.g. "a breach of contract claim against the prime contractor for [a defendant's] new home."[4] The Section 1983 claims at issue here involve statements and evidence from the same events as the criminal matter. This creates a number of complications and obliges parties and judges to engage in the same type of speculation the Court sought to prevent in *Wallace*. We ask the Court to take this case and continue the practice of the majority of circuit courts

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[4] *Wallace v. Kato*, 549 U.S. 384, 396 (2007).

by designating the conclusion of criminal proceedings as the accrual date.

ARGUMENT

I. The Second Circuit Adopted an Improperly Narrow View of the Harm Caused by Fabricated Evidence

The Court should evaluate the petition for writ of certiorari in this case mindful of the severity and frequency of the misconduct at issue. Fabricated evidence is not a black swan; it is an invasive species.

Few doubt the seriousness of this misconduct. This Court has stated that false evidence "involves far more than an injury to a single litigant" and is "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."[5] Even more vigilance is required when those perpetrating the fraud are part of those very institutions.

Often overlooked is the frequency of this misconduct and the variety of people subject to it. The pressure to achieve results – or simply the opportunity to exploit power – has led to both individual examples of fabricating evidence and a series of high-profile scandals in which state actors committed such fraud *en masse* over lengthy periods of time. From line officers in urban police departments to laboratory technicians far removed from personal danger, this misconduct goes well beyond the stereotypical small-town sheriff.

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[5] *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

In Baltimore, Maryland, a police unit known as the Gun Trace Task Force recently engaged in a pattern of falsifying evidence as part of a widespread criminal scheme. The unit was designed to track the firearms responsible for a record rate of homicides in Baltimore by wearing plain clothes and using unmarked vehicles. Instead, the unit became corrupted to the point where "almost every member" was arrested and nearly 1,700 criminal cases were called into question due to issues such as planting drugs on innocent people.[6] The city has yet to determine how this misconduct became so pervasive; a state task force convened to examine the subject had its first meeting last month.[7]

Police officers are not the only state actors engaging in such behavior. In one recent scandal, a single Massachusetts lab technician fabricated evidence affecting *36,000* defendants.[8] This incident was not unique even in its own laboratory – unrelated misconduct by another technician required the dismissal of 10,000 additional cases.[9] Remarkably, the misconduct continued outside the laboratory, as further "fraud upon the court" was committed by two state assistant

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[6] Jessica Lussenhop, *When Cops Become Robbers*, BBC (April 3, 2018), available at https://www.bbc.co.uk/news/resources/idt-sh/when_cops_become_robbers.

[7] Justin Fenton, *'Everything on the Table' as Commission Begins Examining Corrupt Baltimore Police Gun Trace Task Force*, THE BALTIMORE SUN (October 16, 2018), available at https://www.baltimoresun.com/news/maryland/crime/bs-md-ci-gttf-commission-first-meeting-20181016-story.html.

[8] Shira Schoenberg, *SJC Will Decide How to Reimburse Dookhan, Farak Defendants*, MASS LIVE (Sept. 13, 2018), available at https://www.masslive.com/politics/index.ssf/2018/09/sjc_will_decide_how_to_reimbur.html.

[9] *Id.*

attorneys general who "tampered with the fair administration of justice" by manipulating evidence after the laboratory scandal had become public knowledge.[10]

Those accused of drug-related crimes are not the only parties wronged by fabricated evidence. State actors who enforce regulations against large companies may engage in the same fabrication for many of the same reasons. In one such case, an oil refinery learned an employee had submitted a false report to regulators. The company fired the employee, voluntarily disclosed the issue to regulators, and brought the facility back into compliance. The federal government nonetheless decided to prosecute four employees for the incident and issued indictments on ninety-seven counts. There was just one problem – the prosecution was based on fabricated evidence. A state actor had deleted key portions of the record when submitting it to a grand jury, removing the voluntary self-disclosure completely. All charges were eventually dropped against the employees, but only after years of unnecessary and harrowing legal proceedings.[11]

The decision below increases the odds that such myriad wrongs will not be righted. As discussed in Sections II and III, *infra*, the Second Circuit has created a rule which introduces numerous problems into filing Section 1983 claims for fabricated evidence without serving a significant purpose. Additionally, by treating such claims as having accrued at defendant's first exposure to fabricated evidence, it failed to

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[10] *Commonwealth v. Cotto*, No. 2007770, 2017 WL 4124972, at *34 (Mass. Super. June 26, 2017).

[11] Mark V. Holden, *The Second Chance: A Movement to Ensure the American Dream*, 87 UMKC L. Rev. 61 (2018).

understand how such claims differ from other Section 1983 claims such as those for false arrest. Fabricated evidence is not an incarceration with a distinct period, nor is it an object discarded after initial use. It is inextricably bound with the proceedings into which it was introduced for as long as that proceeding continues or can be renewed. Like any piece of evidence, it may be raised in opening statements, with multiple witnesses, and at closing arguments. The jury may consider this evidence, ask questions about it, or even base its verdict on it. Its significance can only be fully measured by defendants and courts after it has been introduced and challenged at the criminal proceeding itself.

II. Having Section 1983 Claims Accrue During the Related Criminal Proceeding Will Traduce the Rights of the Accused and Waste Prosecutorial Resources

The barriers to filing a complex civil lawsuit in federal court were already substantial before the Second Circuit ruling in this case. The filing fee alone is more than a majority of U.S. households have saved in case of emergency.[12] The median cost of the subsequent civil lawsuit is nearly 40 times this amount.[13] By

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[12] BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM: REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017 (May 2018), available at https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf.

[13] Corina D. Gerety, *Excess and Access: Consensus on the American Civil Justice Landscape*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (Feb. 28, 2011), available at http://iaals.du.edu/publications/excess-and-access-consensus-american-civil-justice-landscape. This includes all federal civil cases,

definition, a defendant facing imprisonment due to fabricated evidence is carrying an even heavier burden – he is facing state actors who are willing to break the law they purportedly enforce.

Even if a defendant were to overcome these obstacles and file a timely Section 1983 lawsuit while facing criminal charges, the mere act of doing so would complicate his ability to defend against those charges effectively. First, it will create an additional adversarial relationship between criminal defendant and state agents, raising the threat of defendants being "punished" for filing civil actions. Such vindictiveness is sufficiently common to have a line of case law from this Court, a further reason to grant certiorari in this case.[14] Retaliation by police officers and political officials against citizens who complain about official misconduct is also a well-known and well-litigated phenomenon.[15]

Second, when this Court last spoke on a related issue, it had not yet issued decisions in *Iqbal* and *Twombly*. The pleading standards established by these cases now require criminal defendants such as the petitioner to discuss with specificity the same events which resulted in their prosecution. This puts them in a nearly impossible position. The more detail included in a civil filing, the higher chance that filing

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but it is almost certainly higher for Section 1983 cases due to the low likelihood of settlement.

[14] *Alabama v. Smith*, 490 U.S. 794, 798 (1989) (discussing Supreme Court cases establishing and construing the vindictiveness doctrine).

[15] *See, e.g., Lozman v. City of Riviera Beach*, 681 F. App'x 746, 749 (11th Cir.), vacated and remanded sub nom. *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945 (2018).

makes it past a motion to dismiss – and the higher chance those same details will be scrutinized and introduced in the still-ongoing criminal matter.

The complications of concurrent proceedings do not solely affect the criminal defendant. Just as that party must file a civil lawsuit while involved in a criminal matter, the government agents whose behavior is the subject of the Section 1983 claim must defend themselves while continuing their duties. At a minimum, this will require responding to the initial filing, and it may include more intrusive steps such as depositions and discovery about complex issues of subjective intent and objective law, again creating a trial-within-a-trial concurrent with the criminal proceeding. Such entanglement is at odds with the existence and underlying purpose of the qualified immunity doctrine, which is to simplify the performance of official duties.

III. Early Accrual Contravenes the Ripeness Doctrine and Wastes Judicial Resources

By declaring Section 1983 claims to accrue at the moment a defendant becomes aware of fabricated evidence, the Second Circuit effectively asks criminal defendants to walk directly from the police station to the courthouse. This creates a dynamic in which timely lawsuits will in many cases be unripe.

As defined by this Court, "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[16] This contingency is present in myriad

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[16] *Texas v. United States*, 523 U.S. 296, 300 (1998), (internal quotation marks omitted), quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985) (quoting 13A

ways here. A defendant presented with false evidence is virtually never going to have proof of its fabrication by those acting under color of law when initially confronted with such evidence. Yet the ruling below demands that a criminal defendant immediately tell the difference between a mistaken eyewitness, one lying for his own benefit, and one lying due to state fabrication – or the difference between laboratory error and laboratory fraud, the latter of which is often documented years later and in thousands of cases at once.[17] What seems like fabricated evidence may not even exist at all, given the Court's allowance of police to use deceptive tactics during interrogations in order to induce confessions.[18] Police officers can wholly fabricate witness statements and cite physical evidence that doesn't exist when interrogating suspects, muddying the evidentiary picture further for defendants attempting to understand and exercise their rights.[19] Despite this thicket of possible situations and explanations, only a few of which justify Section 1983 litigation, the Second Circuit ruling means that a defendant's claim is purportedly "complete and present" the moment he first hears any untrue evidence.[20]

Just as defendants will be unprepared to properly plead these lawsuits under the Second Circuit's decision, courts will be unprepared to properly judge their merits. It is wasteful of judicial resources to devote them to claims based only on a criminal

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C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3532, p. 112 (1984)).

[17] Schoenberg, *supra* note 8.

[18] *Frazier v. Cupp*, 394 U.S. 731 (1969).

[19] *Oregon v. Mathiason*, 429 U.S. 492 (1977).

[20] *Wallace*, 549 U.S. at 384.

defendant's initial exposure to false evidence. This Court made clear in *Iqbal* that conclusions are not sufficient to support a claim, but what else can a criminal defendant offer at such a nascent stage of proceedings in support of a claim of fabrication than the conclusion that prosecutors or police must be responsible? Such a wide gap between when a claim accrues and when it can be realistically pleaded under modern standards with sufficient factual support does not serve the interests of justice. As criminal trials progress, including through appeals, the source and validity of evidence are brought into the open and challenged as part of the adversarial process. Witnesses often change or recant their stories, and physical evidence is shown to be unreliable or reexamined in a wider context. Only after this examination of the evidence has concluded will Section 1983 claims of fabricated evidence be ripe for adjudication.

This Court indicated in *Wallace* that stays of civil actions "until the criminal case or the likelihood of a criminal case is ended" were sufficient to avoid incomplete or speculative claims.[21] That conclusion should not be relied upon in this case for several reasons. First, as noted in Section I, claims for fabricated evidence are inherently different in nature and severity than those for false arrest, the claim at issue in *Wallace*. Such arrests are pre-trial violations which end the moment a defendant is arraigned or otherwise detained pursuant to legal process.[22] Second, it should not be assumed that stays will be issued. Courts are under no obligation to stay a proceeding if the complaint contains insufficient detail to satisfy pleading

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[21] *Id.* at 394.

[22] *Heck v. Humphrey*, 512 U.S. 477, 484 (1994).

standards, a situation likely here for reasons unrelated to the merits of the claim. Third, a reliance on stays assumes that lawsuits can be brought in the first place. As discussed in Section II, additional statements related to the criminal matter will complicate the defense in that matter, and a concurrent civil suit is a significant burden on those already mounting such a defense. Few criminal defense attorneys would ever advise a client to file a concurrent civil suit as a result.

In addition, the dramatically elongated timeline envisioned by reliance on stays will shrink the already limited number of attorneys willing to bring Section 1983 civil suits. As posited by *Wallace* and the Second Circuit decision here, there are only two possible outcomes for a fabrication of evidence lawsuit filed when first timely – a stay until completion of a criminal trial or a concurrent proceeding with that trial. The stay comes with all the uncertainty of what may come to light during a trial, and the concurrent proceedings mean representing a client with momentous other demands on their time, resources, and loyalties. Neither is an appealing proposition for plaintiffs' lawyers being asked to steward complex litigation against state actors.

The question of remedy is also complicated by early accrual. A timely Section 1983 lawsuit filed during a criminal proceeding faces numerous questions about what remedy or damages are appropriate, many of which hinge on the resolution of that proceeding. If the civil court finds that evidence was fabricated, it can hardly dictate to a separate criminal tribunal that such evidence be withdrawn. Yet any other remedy leaves open the surreal possibility that a criminal defendant could win in civil court and then be

convicted based on the very evidence found to have been fabricated. This goes against the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transactions."[23] Nor can we expect a criminal defendant to properly plead damages when the extent of the harm caused by the fabricated evidence is unknown. The use of fabricated evidence is always a severe affront to justice, but even the damage caused by an unsuccessful prosecution pales in comparison to one that ends with a wrongful conviction.

IV. Having Claims Accrue at the Conclusion of Criminal Proceedings Avoids These Problems

There is a clear solution to these issues, a point at which certainty exists for all parties: the end of the criminal proceeding. As noted in *Wallace*, defendants whose proceedings end with a conviction are expected to address that conviction via appeal, writ of habeas corpus, executive order, or other means of having it declared invalid before filing a Section 1983 claim which would impugn the conviction.[24] The reason for this is made clear: Section 1983 claims, and civil tort actions in general, should not serve as collateral attacks.[25]

The same logic applies without a conviction. While the petitioner here was ultimately acquitted, he should not be punished for having allowed an ongoing crimi-

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[23] *Id.* (quoting 8 S. Speiser, C. Krause, & A. Gans, American Law of Torts § 28:5, 24 (1991)).

[24] *Wallace*, 549 U.S. at 392 (quoting *Heck v. Humphrey*, 512 U.S. 477 (1994)).

[25] *Id.*

nal process to conclude – and the evidence in question to be openly challenged – before filing a civil lawsuit claiming illegal behavior by those conducting that process. We recognize that a criminal defendant is not "absolved from all other responsibilities that the law would otherwise place upon him."[26] Yet the necessity of a fully-developed record is clear in equipping defendants and courts with the information required to properly plead and adjudicate claims of fabricated evidence, particularly since the decisions in *Iqbal* and *Twombly*. The Section 1983 claims in question here are legal obligations directly tied to the criminal proceeding. Having that proceeding conclude first is the appropriate way to address the intolerable wrong of fabricated evidence, conserve prosecutorial and judicial resources, and serve the interests of justice. The majority of circuits are correct, and the Court should grant certiorari to so rule.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

JOHN J. VECCHIONE
Counsel of Record
JOHN E. MCGLOTHLIN II
MICHAEL R. GESKE
CAUSE OF ACTION INSTITUTE
1875 Eye Street N.W.
Washington, D.C. 20006
(202) 499-4232
John.Vecchione@causeofaction.org

Counsel for Amicus Curiae

November 15, 2018

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[26] *Id.* at 396.